

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

BARRE BARNES dba B & C
CONSTRUCTION,

Debtor.

Case No. 91-5-2819-MM

Chapter 11

BANK OF THE WEST,

Plaintiff,

Adversary No. 91-5423

vs.

MEMORANDUM OPINION

BARRE BARNES, individually and dba B &
C CONSTRUCTION,

Defendant.

MEMORANDUM OPINION AND ORDER THEREON

INTRODUCTION

Before the Court is the complaint to determine discharge under § 523(a)(2) filed by Bank of the West (the "Bank") to declare non-dischargeable the debtor's liability to the Bank arising from his presentment to the Bank of checks made jointly payable to Framing Systems, Inc. and a second payee, Big Creek Lumber. The case was submitted largely on stipulated facts. The parties disagree on facts relating to the debtor's intent and to reliance by the creditor. For the reasons to follow, the debt to the Bank is non-dischargeable.

DISCUSSION

Each of the elements for non-dischargeability under section 523(a)(2) have been satisfied. In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992).

A. False Pretense or Representation

For purposes of dischargeability under § 523(a)(2), fraud may consist of silence, concealment or intentional non-disclosure of a material fact, as well as affirmative misrepresentation of a material fact. In re Schmidt, 70 Bankr. 634, 640 (Bankr. N.D. Ind. 1986). A false pretense involves implied misrepresentation or conduct intended to create and foster a false impression. Id. By endorsing and presenting the checks to the Bank, Barnes warranted that he had good title to the checks. Cal. Com. Code § 3417(a); Cignetti v. American Trust Co., 139 Cal. App. 2d 744 (Cal. App. 1956). Presentment of the checks further constitutes a fraudulent representation that Barnes, as president of Framing Systems, Inc., was authorized to negotiate the checks on behalf of the joint payee, Big Creek Lumber. In re Wilson, 114 Bankr. 249, 252 (Bankr. E.D. Cal. 1990)(debtor's presentment of checks made jointly payable to subcontractor induced plaintiff to extend credit to debtor, but no finding of requisite intent); In re Yagow, 61 Bankr. 109, 112-13 (Bankr. D.N.D. 1986). The endorsement impliedly represented that Barnes had the exclusive right to the proceeds of the checks and the authority to obtain payment on behalf of Big Creek Lumber. Yagow, 61 Bankr. at 113. These representations were false.

B. Intent to Deceive

The debtor must have acted with the intention and purpose of deceiving the creditor. In re Hultquist, 101 Bankr. 180, 184 (Bankr. 9th Cir. 1989). The intent to deceive required for a finding of non-dischargeability can be inferred from the surrounding circumstances. Id. at 183. The Bank need not show that the debtor specifically intended to injure the Bank. That Barnes intended to deceive the Bank can be inferred from the evidence and the totality of circumstances. Barnes testified that he only intended to "buy a little time." However, because he intended the act at issue, Barnes is bound by the consequences of his act.

1 This case is distinguishable from Wilson because Barnes could not have reasonably expected
2 that Framing Systems would be able to repay Big Creek Lumber within the foreseeable future.
3 During that time frame, Framing Systems had to borrow funds to meet its operating expenses, and it
4 was delinquent in paying its taxes. Barnes knew the status of the company's cash flow position.
5 Also, rather than paying Big Creek Lumber or reinjecting all of the proceeds of the checks into the
6 business, Barnes paid himself \$38,000 as compensation.

7 Further, Barnes knew that the Bank required two endorsements to negotiate two-party
8 checks and that the Bank would not consent to negotiate the checks without the required
9 endorsements. He also knew of Big Creek Lumber's interest in the proceeds of the checks, that
10 Framing Systems was not authorized to receive payment on behalf of Big Creek Lumber, and that Big
11 Creek Lumber had not given its consent that Framing Systems deposit the jointly payable checks into
12 its own account.

13 14 C. Justifiable Reliance

15 To determine whether a creditor justifiably relied on the debtor's representations, the Court
16 must look to all of the circumstances surrounding the particular transaction and consider in particular
17 the subjective effect of those circumstances on the creditor. In re Kirsh, 973 F.2d at 1460. The
18 standard is a subjective one that takes into account the knowledge and relationship of the parties
19 themselves. Id. at 1458. A creditor cannot close its "eyes to avoid discovery of the truth. . . ."
20 Seeger v. Odell, 18 Cal. 2d 409, 415 (1941). Nor may it throw caution to the wind. Kirsh, 973 F.2d
21 at 1460-61. However, it is not required to verify all of the debtor's statements. In re Ashley, 903
22 F.2d 599, 604-05 (9th Cir. 1989).

23 Despite the debtor's conflicting testimony, the evidence reveals that the Bank requested that
24 the debtor submit the checks with two endorsements. The Bank's witness, Jean Hopkins, also
25 testified that there was no reason to believe that the signatures were not in order when the checks
26 were submitted. The Court finds that the testimony of Ms. Hopkins is credible, and the Bank's
27 reliance is justifiable under the circumstances. If the reliance on a false representation is justifiable, a
28 person's contributory negligence will not bar his recovery. Kirch, 973 F.2d at 1458 (citing

1 Restatement (Second) of Torts § 545A (1977)). The failure of the Bank to adhere to its internal
2 policies in itself does not preclude recovery. Id. at 1458-59.

3
4 **D. Damages Sustained as Proximate Result**

5 A determination of non-dischargeability also requires a finding that the debtor's
6 representations proximately caused the creditor's damages. Kirsh, 973 F.2d at 1457.

7 Proximate cause is sometimes said to depend whether the conduct
8 has been so significant and important a cause that the defendant
9 should be legally responsible. But both significance and importance
10 turn upon conclusions in terms of legal policy, so that they depend
11 on whether the policy of the law will extend the responsibility for
12 the conduct to the consequences which have in fact occurred.

13 In re Siriani, 967 F.2d 302, 306 (9th Cir. 1992)(citing W. Page Keeton et al., Prosser and Keeton
14 on the Law of Torts § 42 at 273 (5th ed. 1984)). There can be no question that the damages
15 suffered by the Bank to the extent of \$147,094.10, the amount of the account overdraft caused
16 from the reversal of the four deposits, were a direct consequence of the debtor's presentment of
17 the checks for negotiation. As such, there was proximate causation, and the debtor shall be held
18 responsible for the Bank's damages.

19
20 **E. Liability While Acting in Corporate Capacity**

21 Barnes argued that he may not be held liable to the Bank because he was acting in his
22 corporate capacity. However, Barnes may be personally liable to the Bank because a corporate
23 agent is liable for his own fraud. In re Baird, 114 Bankr. 198, 204 (Bankr. 9th Cir.
24 1990)(corporate officer or director who engages in tortious conduct is personally liable for the
25 tort, notwithstanding that the officer may have acted on behalf of the corporation); In re Manser,
26 99 Bankr. 434, 436 (Bankr. 9th Cir. 1989)(personal debtor who, as officer of a corporation,
27 actively participates in the conversion of property which is subject to the security interest of a
28 third party, is personally liable to that party in a dischargeability action); In re Heckenkamp, 110
Bankr. 1, 3 (Bankr. C.D. Cal. 1989)(individual was liable for own fraud under section
523(a)(2)(A) although he was merely acting as corporate agent). See also Lawrence T. Lasagna,

1 Inc. v. Foster, 609 F.2d 392 (9th Cir. 1979), cert. denied, 446 U.S. 919 (1980).

2
3 **CONCLUSION**

4 Since all of the elements under section 523(a)(2)(A) are satisfied, the debt to the Bank in
5 the amount of \$147,094.10 is held to be non-dischargeable.

6 Accordingly, IT IS SO ORDERED.

7
8 DATED:

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10 UNITED STATES BANKRUPTCY JUDGE